No. 15169

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JACK LEWIS AND JOE LEVITAN, D/B/A CALIFORNIA FOOTWEAR COMPANY, AND TRINA SHOE COMPANY, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITION FOR REHEARING

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PETITION FOR REHEARING

The National Labor Relations Board respectfully petitions the Court for rehearing of its decision herein, insofar as it has eliminated, by its decree of August 19, 1957, paragraph 1 (c) of the Board's order. This paragraph requires respondents to cease and desist from "In any other manner interfering with, restraining, or coercing their employees in the exercise of their right[s under Section 7 of the Act]."

In accordance with its opinion of July 1, 1957, the Court's decree enforces those parts of the Board's order which remedy respondents' unlawful discrimination against employee Roark and their refusal to bargain with the Union, and remands to the Board

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for reconsideration that part of its order respecting the alleged discrimination against employee Piasek. The propriety of paragraph 1 (c), however, was not discussed in the Court's opinion, nor was its elimination requested by respondents. In the absence of an expression of the Court's reasons for denying enforcement of paragraph 1 (c), we are not certain of the grounds for the Court's action. In any event, as we show below, we do not believe the validity of this provision was properly before the Court for decision. More importantly, we believe that the Court may have overlooked the fact that the deletion of paragraph 1 (c) has eliminated altogether a remedy for conduct which, under the findings of the Board and the decision of this Court, is violative of the Act. Finally, we believe, even apart from the foregoing considerations, that under established authority enforcement of paragraph 1 (c) is warranted by the serious and pervasive character of the other violations found. None of these contentions, which we briefly develop below, has been presented to the Court in the briefs heretofore filed inasmuch as we were not aware that the validity of paragraph 1 (c) of the Board's order was in issue.

1. The cease and desist provision in question was adopted by the Board from the Trial Examiner's recommended order (R. 124, 143). No discussion of the provision is contained in the Board's decision, as respondents did not raise the matter before the Board.[1]

[1] Respondents' blanket exception to all parts of the recommended order directed against them (R. 25) does not suffice to

Similarly, neither respondents' Statements of Points nor their brief before this Court makes any reference to paragraph 1 (c) of the Board's order.

In these circumstances, it would appear that Section 10 (e) of the Act presents a procedural bar to judicial modification of this portion of the Board's order. Section 10 (e) provides that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This preclusionary rule operates not only to bar belated contentions of parties,[2] but also to prevent consideration by a court *sua sponte* of questions not properly preserved. Thus, in *F. P. C.* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, the Supreme Court had before it a provision in Section 19 of the Natural Gas Act (52 Stat. 831–832, as amended, 15 U. S. C. 717) which virtually parallels the language of Section

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preserve the present question as to the validity of paragraph 1 (c) of the order. Under Section 10 (e) of the Act exceptions must be sufficiently explicit to afford "the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Company* v. *N. R. L. B.*, 318 U. S. 253, 256. And, as the Supreme Court stated in the cited case, "Such a general objection" as that taken by respondents here does not meet this requirement. 318 U. S. at 255. Moreover, respondents' brief to the Board made no contention respecting the validity of paragraph 1 (c) of the order.

[2] See, *e. g.*, *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385; *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 350; *N. L. R. B.* v. *Pinkerton's National Detective Agency*, 202 F. 2d, 230, 232–233 (C. A. 9); *N. L. R. B.* v. *Pappas & Co.*, 203 F. 2d 569, 571 (C. A. 9).

10 (e) of the Act.[3] After ruling that a party in that case was barred by the Natural Gas Act's provision from raising an objection before the court of appeals which it had not specifically urged before the Federal Power Commission, the Supreme Court also determined that the same provision precluded the court from considering the objection, *sua sponte*. As the Court stated, "To allow a Court of Appeals to intervene on its own motion would seriously undermine the purpose of the explicit requirements of Section 10 (b) that objections must first come before the Commission." 348 U. S. at 498–499. See also this Court's decision on petition for rehearing in *N. L. R. B.* v. *Jay Co.*, 227 F. 2d 416, 419–420.

In sum, the effect of Section 10 (e) is to require the courts of appeals "to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested." *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, 389. Issues pertaining to the validity of paragraph 1 (c) of the Board's order in this case would appear clearly to fall within this rule. Accordingly, we submit that the Court should reconsider its deletion of that provision, and should enforce it in full.

2. The requirement of paragraph 1 (c) of the Board's order that respondents cease and desist from "interfering with, restraining, or coercing their em-

[3] Section 10 (b) of the Natural Gas Act reads: "* * * No objection to the order of the [Federal Power] Commission shall be considered by the court [of appeals] unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."

ployees in the exercise of their rights [under Section 7 of the Act]" provides the only remedy given for respondents' illegal acts of surveillance and interrogation of their employees. See the Board's main brief, pp. 26–30. The Board's findings of illegality in this respect were not contested in respondents' brief to the Court (Res. Br. p. 2), and although mentioned, were not discussed in the Court's opinion of July 1, 1957 (sl. op. p. 3). In view of these circumstances, together with the Court's stated willingness "to promptly enforce the order, except as to Piasek" (*id.*, p. 8), we assume that the Board's findings as to respondents' surveillance and interrogation have been affirmed. The effect of eliminating paragraph 1 (c) of the Board's order from the enforcement decree, however, is to leave unremedied these serious violations of the Act. We cannot believe that this consequence was intended, and submit that the Court should reconsider its action and reinstate paragraph 1 (c) in order to provide a complete remedy for the violations found.

3. In addition to providing a specific remedy for unlawful acts of surveillance and interrogation, paragraph 1 (c) of the Board's order performs the important function of preventing respondents from continuing to oppose the Union by other acts of interference with the exercise of their employees' statutory rights. This provision is couched in the conventional language which has been sanctioned by the Supreme Court as well as this Court in cases where "the record disclose[s] persistent attempts by varying methods to interfere with the right of self-organization in cir-

cumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future" *N. L. R. B.* v. *Express Publishing Co.,* 312 U. S. 426, 438. See also, *May Department Stores Co.* v. *N. L. R. B.,* 326 U. S. 376, 390; *N. L. R. B.* v. *Globe Wireless,* 193 F. 2d 748 (C. A. 9); *N. L. R. B.* v. *Reeves Rubber Co.,* 153 F. 2d 340, 343 (C. A. 9). The record of the instant case plainly fits the foregoing description. As more fully detailed in our main brief (pp. 9–15), respondents resolutely attempted by a variety of techniques to eliminate the Union from the Venice plant. Thus, the misrepresentation to the Union that California Footwear was going out of business, the refusal to discuss with the Union the transfer of old employees to the new location in Venice, the discontinuance of the existing collective bargaining contract and the refusal to recognize the Union at the Venice location, the surveillance of a Union meeting, the coercive interrogation of employees at the Venice plant, and the refusal to hire employee Roark because she was a Union steward constitute a pattern of opposition to employee organization reflective of an intent to get rid of the Union at any cost. In short, this case exemplifies the typical situation which calls for the general cease and desist order contemplated by the Supreme Court in the *Express Publishing* case, *supra.*[4]

[4] The recent decision of this Court in *N. L. R. B.* v. *Shuck Construction Co.*, decided May 16, 1957, 40 LRRM 2167, in

CONCLUSION

For these reasons, it is respectfully submitted that this petition for rehearing be granted, and that upon rehearing the Court reinstate paragraph 1 (c) of the Board's order in its enforcement decree of August 19, 1957.

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which the Court eliminated a provision of the Board's remedial order that was directed at conduct "like or similar" to that which was found unlawful, may readily be distinguished from the instant case. Thus, the remaining enforced provisions of the order in the *Shuck* case remedied the specific conduct found in that case to be violative of the Act. Here, to the contrary, deletion of paragraph 1 (c) leaves unremedied certain of respondents' activities which violated the Act. Moreover, the unfair labor practices in *Shuck* were confined to the maintenance and enforcement of an illegal union security contract, which the Court may have thought could effectively be reached by an order tailored to the particular violations. In this case, on the other hand, the diversity and frequency of respondents' violations indicate a general disregard for the statutory rights of their employees, so that it may reasonably be anticipated that other acts of interference might occur in the future unless expressly prohibited by judicially enforced order.

CERTIFICATE OF COUNSEL

Stephen Leonard, Associate General Counsel of the National Labor Relations Board, certifies that he has read and knows the contents of the foregoing petition and that said petition is filed in good faith and not for purposes of delay.

STEPHEN LEONARD,
Associate General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., this 16th day of September 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957